

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

**William Kimberley Development
Corporation
Polk County, Iowa**

**ADMINISTRATIVE
CONSENT ORDER
NO. 2023-WW-09**

TO: Matthew M Hurn, Registered Agent
William Kimberley Development Corporation
4201 Westown Pkwy Ste 200
West Des Moines, IA 50266

Jenna Kimberley
Kimberley Development Corporation
2785 N. Ankeny Blvd., STE 22
Ankeny, IA 50023

I. SUMMARY

This administrative consent order (order) is entered into between William Kimberley Development Corporation (Kimberley) and the Iowa Department of Natural Resources (Department). The parties hereby agree to the issuance of this order due to violations of Kimberley's storm water National Pollutant Discharge Elimination System (NPDES) permits at its Kimberly Woods construction site (site). Kimberley agrees to pay an administrative penalty of \$9,000.00. In the interest of avoiding litigation, the parties have agreed to resolve the violations alleged herein through entry of this order.

Any questions or responses regarding this order should be directed to:

Relating to technical requirements:

Dennis Thielen
IDNR Field Office No. 5
Iowa Department of Natural Resources
502 E 9th Street
Des Moines, IA 50319-0034
712/262-4177

Relating to legal requirements:

Carrie Schoenebaum, Attorney
Iowa Department of Natural Resources
502 E 9th Street
Des Moines, Iowa 50319-0034
Phone: 515-444-8165

Payment of penalty to:

Iowa Department of Natural Resources
502 East 9th Street
Des Moines, Iowa 50319-0034

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II. JURISDICTION

This order is issued pursuant to Iowa Code section 455B.175(1), which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division III, Part I and the rules promulgated or permits issued pursuant thereto; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

III. STATEMENT OF FACTS

1. On October 1, 2021, Kimberley was issued a notice of coverage under NPDES General Permit No. 2 for storm water discharge associated with construction activity at the location of the Kimberley Woods construction site. Kimberley Woods is located at Section 27, Township 81 Range 23W, Elkhart, Iowa. Storm water from this property flows northeast to an unnamed tributary, which flows into Drainage Ditch number 11, which flows into to the Skunk River.
2. On October 27, 2022, the Department conducted a NPDES permit inspection. Once on site the Department observed and/or documented the following:
 - (1) A storm water retention basin had been constructed on the north side of the site. This basin captures the runoff form a majority of the site:
 - a) A standpipe had not been installed inside the basin;
 - b) Perimeter controls on the north side of the berm of the basin were not installed or had failed and sediment was observed flowing from the basin into the stream;
 - (2) On the east side of the site temporary ditches had been cut into the final grade to help water drain from the site;
 - (3) Soil stockpiles had not been temporarily stabilized;
 - (4) Final grade appeared to have been achieved on a majority of the site however the site had not been stabilized; and
 - (5) Rill, sheet and gully erosion was present across the site.

Following the onsite inspection, a copy of the Storm Water Pollution Prevention Plan (SWPPP) was e-mailed to the Department. The SWPPP did not contain contractor certifications. Further, the Department reviewed the weekly inspections October 1 through October 22, 2022. These inspections did not document any deficiencies on the site. Specifically, the inspections failed to identify the lack of stabilization, the deficiencies around the stormwater basin, and the north side of the site was not inspected.

3. On November 4, 2022, a Notice of Violation (NOV) was sent to Kimberley for the above discussed violations. Included with this NOV was a copy of the inspection report, recommended corrective action, and a summary of the law.

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IV. CONCLUSIONS OF LAW

The parties hereby agree to the following conclusions of law:

1. Iowa Code section 455B.186 prohibits the discharge of pollutants into a water of the state, except for adequately treated pollutants discharged pursuant to a permit issued by the Department. The above stated facts demonstrate non-compliance with this provision of law.

2. Iowa Code sections 455B.103(A) and 455B.197 authorize the issuance of permits for storm water discharges. The Environmental Protection Commission (Commission) has adopted federal regulations pertaining to the issuance of NPDES permits for storm water discharge at 567 IAC 60.2 and in 567 IAC chapter 64. Pursuant to rule 60.2, "Storm water discharge associated with industrial activity" means the discharge from any conveyance which is used for collecting and conveying storm water and which is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. Number 10 under this definition includes "construction activity" including clearing, grading, and excavation activities. Excluded are operations that result in the disturbance of less than one acre of total land area that are not part of a larger common plan of development or sale.

3. 567 IAC 61.3(2)"c" and "e" state:

- c. Such waters shall be free from materials attributable to wastewater discharges or agricultural practices producing objectional color, odor or other aesthetically objectional conditions. [and]
- e. Such waters shall be free from substances, attributable to wastewater discharges or agricultural practices, in quantities which would produce undesirable or nuisance aquatic life.

The above stated facts demonstrate noncompliance with these provisions of law.

4. Subrule 567 IAC 64.3(1) provides that no person shall operate any wastewater disposal system or part thereof without, or contrary to any condition of, an operation permit issued by the Director. The above stated facts demonstrate noncompliance with this provision.

5. NPDES Part III. C (1) of NPDES General Permit No. 2 requires that erosion and sediment controls be installed and maintained. The above stated facts demonstrate noncompliance with this provision of law.

6. NPDES Part III. C (3) of NPDES General Permit No. 2 requires that:

"stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days."

The above stated facts demonstrate noncompliance with this provision of law.

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7. NPDES Part IV. D (7) of NPDES General Permit No. 2 requires “[a]ll contractors and subcontractors identified in the plan must sign a copy of the certification statement[.]” The above stated facts demonstrate noncompliance with this provision of law.

8. Part VI. D of NPDES General Permit No. 2 requires that the permittee “take all reasonable steps to minimize or prevent any discharge in violation of this permit.” The above stated facts demonstrate noncompliance with this provision of law.

V. ORDER

THEREFORE, the Department orders, and Kimberley consents to do, the following:

1. Comply with all conditions of Kimberley’s NPDES permits, which includes the SWPPP; and
2. Pay an administrative penalty of \$9,000.00 within 30 days of the date the Director signs this order.

VI. PENALTY

1. Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for the violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00 which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to this chapter, the Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative order with an administrative penalty. The administrative penalty is determined as follows:

a. **Economic Benefit.** 567 IAC chapter 10 requires that the Department consider the costs saved or likely to be saved by noncompliance. 567 IAC 10.2(1) states that “where the violator received an economic benefit through the violation or by not taking timely compliance or corrective measures, the department shall take enforcement action which includes penalties which at least offset the economic benefit.” 567 IAC 10.2(1) further states, “reasonable estimates of economic benefit should be made where clear data are not available.” An economic benefit was obtained through avoiding the cost installing and maintaining adequate storm water erosion and sediment control measures throughout the construction site. This avoided several thousand dollars in materials and labor expenses. Thus, it is reasonable to estimate that \$3,000.00 was saved. Therefore, \$3,000.00 is assessed for this factor.

b. **Gravity of the Violation.** One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for the type of violation. As indicated above, substantial civil penalties are authorized by statute. Failure to properly manage storm water runoff from construction sites degrades surface water quality and deposits excess sediment in water channels. Sedimentation of Iowa’s waterways is a serious problem, and regulatory agencies have recognized that uncontrolled runoff is a significant contributor to these

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problems. Degraded water quality harms aquatic life, prevents the attainment of state water quality goals, and causes a decline in the quality of life generally. The erosion and sediment controls contained in Kimberley's NPDES permits protect Iowa's waterways from sedimentation. Such noncompliance thwarts the integrity of the NPDES permit and water quality programs. Therefore, the amount of \$3,000.00 is assessed for this factor.

c. **Culpability.** Kimberley is engaged in the business of development and construction. This is a highly regulated activity and therefore Kimberley has an obligation to be aware of the applicable regulations and comply with those regulations. Therefore, the amount of \$3,000.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

Iowa Code section 455B.175(1) and 561 IAC 7.4(1), as adopted by reference by 567 IAC chapter 7, authorize a written notice of appeal to the Commission. This order is entered into knowingly by and with the consent Kimberley. By signature to this order, all rights to appeal this order are waived by Kimberley.

VIII. NONCOMPLIANCE

Failure to comply with this order may result in the imposition of further administrative penalties or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191. Compliance with Section V. of this order constitutes full satisfaction of all requirements pertaining to the violations described in this order.



On behalf of, William Kimberley Development Corporation

Dated this 18th day of
April, 2023

Kayla Lyon, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

William Kimberley Development Corporation (Copy of Order to Central Office Records File),
FO 5, Carrie Schoenebaum- Legal Services Bureau, U.S. E.P.A, I.C.7.b.